



UNITED STATES SENATE
**REPUBLICAN
POLICY COMMITTEE**

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Why the House's "Reinsurance Bill" Includes Litigation Management Reforms

The two houses of Congress have different ideas about how best to provide for Federal guarantees in the reinsurance market. Whatever formula is decided upon, however, the taxpayers of the United States will become the ultimate insurers for the reinsurers: Huge losses caused by acts of terrorism will be paid for by American taxpayers.

The House of Representatives passed its "reinsurance bill" on November 29 (H.R. 3210, the Terrorism Risk Protection Act). Because taxpayers will be assuming financial liability, the House included various litigation management reforms that will help protect taxpayers, and further help ensure that a large proportion of limited resources will go to actual victims of terrorism and not to trial lawyers and others.

The House bill also is intended to streamline the process of getting aid to victims of terrorism. Many persons are not aware of how long some victims have to wait: The September 11 attack on the World Trade Center killed more than 3,000 persons and injured thousands more. In contrast, the 1993 bombing of the World Trade Center (from the parking garage) killed six persons. The 1993 crime has resulted in some 500 lawsuits by 700 individuals, businesses, and insurance companies claiming \$500 million. Now, eight years after the event, many of the cases are just getting to trial, and hundreds of plaintiffs have yet to receive a cent.

On the House floor, Representative James Sensenbrenner, the Chairman of the House Judiciary Committee (and a leader for litigation reform), explained the need for the reforms. Those reforms are summarized in the Appendix to this paper, and Mr. Sensenbrenner said of them:

"I am particularly supportive of the litigation management provisions in H.R. 3210 which will benefit all people in all industries that fall victim to terrorist attacks of a catastrophic nature. Any bill that fails to limit potentially infinite liability for terrorist-caused litigation would fail to recognize the obvious: Traditional tort rules are designed to address slip-and-fall cases caused by banana peels, not terrorists; and while banana peels may be accidents waiting to happen, terrorists are suicidal killers plotting the deaths of thousands of innocents and the destruction of billions of dollars of

property.

“By enacting the litigation management provisions to cover terrorist-inspired litigation, individuals and businesses will be protected by Congress from potentially unlimited liability and bankruptcy. Also under these provisions, the size of damage awards for which the United States taxpayer will have to provide up-front sums would be reduced, just as the Federal Tort Claims Act’s limits on punitive damages and attorney’s fees limit damages and litigation that will result in money taken from the U.S. Treasury.

“These provisions protect the American taxpayer. Those opposed to them wish to turn the key to the United States Treasury over to the plaintiffs’ bar.” 147 *Congressional Record* H8575 (daily ed. Nov. 29, 2001) (edited).

As Chairman Sensenbrenner says, the House’s “reinsurance bill” draws on precedents from other parts of Federal law. The Federal Tort Claims Act permits the United States Government to be sued for tort claims “in the same manner and to the same extent as a private individual under like circumstances,” but the United States “shall not be liable for interest prior to judgment or for punitive damages.” 28 U.S.C.A. §2674. Also, attorney’s fees are limited to either 25 percent or 20 percent (depending on the particulars of the case) for any judgment, award, compromise, or settlement obtained in the case, and attorneys who charge more may be fined \$2,000 or imprisoned for up to a year, or both. 28 U.S.C.A. §2678. All of these provisions from the Federal Tort Claims Act can be found in the House-passed “reinsurance bill.”

Two other examples were cited on the House floor: The National Vaccine Program sets out a procedure for bringing lawsuits for injuries caused by vaccines. Under those procedures, “punitive and exemplary damages” are not permitted, 42 U.S.C.A. §300aa-15(d), and attorney’s fees are regulated, 42 U.S.C.A. §300aa-15(e).

The Air Transportation Safety and System Stabilization Act, which was signed just weeks ago (on September 22, 2001), provided that liability for all claims against air carriers for the events of September 11 “shall not be in an amount greater than the limits of the liability coverage maintained by” the carrier, and that limit applies to both compensatory and punitive damages. Congress also required that there be an exclusive Federal cause of action for damages arising out of the four airline crashes of September 11, and that the substantive law would be derived from the State in which the crash occurred. Original and exclusive jurisdiction was given to the United States District Court for the Southern District of New York. The United States was given the right of subrogation with respect to any claim paid by the United States. Of course, any person who knowingly participated in any conspiracy to hijack an aircraft or commit an act of terrorism was expressly excluded from any limits on liability. Public Law 107-42, §§408-409. Such provisions also are found in the House’s “reinsurance bill.” (As the bill originally passed the House, it limited punitive damages and attorney’s fees, and it required that damage awards be offset by any collateral-source compensation received by the plaintiffs.)

The House bill is based on precedents that help protect taxpayers and victims alike.

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Appendix

Summary of Section 15 of the House-Passed Version of H.R. 3210, The Terrorism Risk Protection Act

Section 15 is titled, “Litigation Management”. It provides:

- Whenever the Secretary of Treasury determines that an act of terrorism has occurred, any legal claim “arising out of, relating to, or resulting from” that act of terrorism must be filed in Federal court.
- The Secretary’s determination, which is effective when published in the *Federal Register*, is *not* subject to judicial review, but it may be amended by the Secretary.
- (Section 19 of the bill defines as an “act of terrorism” as an act that (a) is unlawful; (b) causes harm to a person, property, or entity in the United States or on a U.S. air carrier or U.S. flag vessel; (c) is committed by (or in conspiracy with) persons or groups designated, either before or after the act, as an international terrorist group; (d) has as its purpose (1) the overthrow or destabilization of any country’s government, or (2) to influence or affect U.S. policy or the U.S. economy, by coercion; and (e) is not an act of war.)
- The Federal cause of action that is created by the Secretary’s determination will be the exclusive remedy available to claimants, but the Federal court will apply the substantive law of the State in which the act of terrorism occurred (unless that law is inconsistent with or preempted by Federal law).
- Once the Secretary has declared that an act of terrorism has occurred, the Judicial Panel on Multidistrict Litigation (a group of seven judges selected by the Chief Justice) will designate one or more Federal district courts which will have original and exclusive jurisdiction over legal actions for claims arising from that act of terrorism. The courts designated shall be chosen “based on the convenience of the parties and the just and efficient conduct of the proceedings.”
- “No punitive damages intended to punish or deter, exemplary damages, or other damages not intended to compensate a plaintiff for actual losses may be awarded.”
- No party shall be liable for interest prior to the judgment.
- A defendant shall *not* be liable jointly and severally, but shall be liable only for the amount of noneconomic damages that are attributed to the defendant’s own acts.

- No plaintiff may recover noneconomic damages unless the plaintiff suffered physical harm.
- The act defines “noneconomic damages” to mean “damages for losses for physical and emotional pain, suffering, inconvenience, physical impairment, mental anguish, disfigurement, loss of enjoyment of life, loss of society and companionship, loss of consortium, hedonic damages, injury to reputation, and any other nonpecuniary losses.”
- Any reward to a plaintiff shall be reduced by the amount of “collateral-source compensation, if any, that the plaintiff has received or is entitled to receive as a result of the acts of terrorism.”
- “Reasonable attorneys fees for work performed shall be subject to the discretion of the court, but in no event shall any attorney charge, demand, receive, or collect for services rendered, fees or compensation in an amount in excess of 20 percent of the damages ordered by the court or of a court-approved settlement.” Attorneys who charge or receive more may be fined and sentenced to a year in jail.
- The above rules do *not* apply to terrorists themselves or to those who aid or abet or conspire with them.
- Whenever a party obtains a judgment against a terrorist party, the “frozen assets of that terrorist party, or any agency or instrumentality of that terrorist party, shall be available for satisfaction of the judgment.” The President may prohibit access to certain frozen assets if he determines that it is in the national security interest to protect property that is subject to the Vienna Convention on Diplomatic Relations or the Vienna Convention on Consular Relations.
- “The United States shall have the right of subrogation with respect to any claim paid by the United States under this Act.” That is, if the United States pays a claim it can then seek reimbursement from any other entity that has a legal responsibility to pay that claim.
- Nothing in the Act is to be construed to affect any party’s contractual right to arbitrate a dispute.
- Nothing in the Act is to be construed to affect any provision of the Air Transportation Safety and System Stabilization Act, Public Law 107-42, 49 U.S.C. 40101 note. As noted in the body of this paper, sections 408 and 409 of that Act contain litigation provisions that are similar to those in the “reinsurance” bill.